

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2014 MSPB 11

Docket Nos. NY-1221-10-0226-W-2
NY-1221-11-0169-W-2

**Colin Clarke,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

February 27, 2014

R. Scott Oswald, Esquire, Washington, D.C., for the appellant.

Jack P. DiTeodoro, Esquire, Brooklyn, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, Member

Vice Chairman Wagner issues a separate opinion
concurring in part and dissenting in part.

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his individual right of action (IRA) appeals. For the reasons set forth below,¹ we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, and DENY the appellant's request for corrective action.

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 On February 3, 2008, the agency appointed the appellant pursuant to [38 U.S.C. § 7405](#)(a)(1) to a part-time excepted-service position as a Physician at the Nuclear Medical Service (NMS) within Patient Care Services at the Veterans Administration Medical Center (VAMC) in Northport, Long Island, New York. Initial Appeal File (IAF-I),² Tab 9, Subtab 4h, Standard Form 50. In an undated letter delivered by first class mail on November 3, 2009, the Director of the Northport VAMC notified the appellant that his appointment was terminated effective October 30, 2009, based on his failure to meet the agency's requirement that all physicians maintain an unrestricted license to practice medicine. *Id.*, Subtab 4d. By letter dated December 16, 2010, the agency's Network Director sustained the appellant's termination. *Id.*, Subtab 4a.

¶3 The appellant thereafter filed a request for corrective action with the Office of Special Counsel (OSC), in which he alleged that his termination was effected in reprisal for protected whistleblowing activity. IAF-III,³ Tab 9 at 8-20. After OSC notified the appellant that it was terminating its investigation into his complaint, the appellant filed an IRA appeal with the Board. *Id.* at 68-70; IAF-I, Tab 1. The administrative judge found that the appellant had made a nonfrivolous allegation of Board jurisdiction over his IRA appeal entitling him to a hearing. IAF-I, Tabs 19, 22.

¶4 The appellant thereafter filed a second IRA appeal in which he alleged that the agency denied his request for reinstatement to service in reprisal for making a disclosure to the agency's Office of Inspector General and to OSC. IAF-II,⁴ Tab

² "IAF-I" refers to the appeal file in the appellant's first IRA appeal, MSPB Docket No. NY-1221-10-0226-W-1.

³ "IAF-III" refers to the NY-1221-10-0226-W-2 appeal file which represents the joined appeals in that docket number and in MSPB Docket No. NY-1221-11-0169-W-2.

⁴ "IAF-II" refers to the appeal file in the appellant's second IRA appeal, MSPB Docket No. NY-1221-11-0169-W-1.

1. The appeals were joined and dismissed without prejudice to allow the parties additional time to engage in discovery. IAF-II, Tabs 6, 8-9. They were thereafter automatically refiled. IAF-III, Tab 1.

¶5 After a 3-day hearing, the administrative judge dismissed the joined appeals. IAF-III, Tab 16, Initial Decision (ID) at 2, 52; Hearing Transcript (HT). The administrative judge determined that, because the appellant was appointed to his position pursuant to [38 U.S.C. § 7405](#)(a)(1), his termination was not an appealable action under chapter 75, and that the Board's authority under the Whistleblower Protection Act (WPA) to order corrective action concerning his termination was therefore contingent upon exhaustion of his administrative remedy with OSC. ID at 7-8. The administrative judge determined that the appellant failed to exhaust his administrative remedy with OSC as to his alleged disclosures from his first IRA appeal concerning: (1) abusive medical billing practices; (2) patient safety concerns for non-compliance with United States Pharmacopeia (USP) Standard No. 797; (3) employee safety concerns for non-compliance with Nuclear Regulatory Commission (NRC) regulations and consequent radiation exposures; (4) destruction of federal records; (5) significantly compromised patient care quality from utilization of substandard imaging equipment; and (6) dictation system incompatibility with the hospital computer system allowing imaging reports to be filed by more than one provider on the same study. ID at 8-16; *see* IAF-I, Tab 1 at 7-14. Notwithstanding this determination, the administrative judge proceeded to find, in the alternative, that even had the appellant exhausted his OSC administrative remedy with respect to those matters, he nonetheless failed to establish that they constituted protected disclosures. ID at 16-34.

¶6 Although the administrative judge determined that the appellant had exhausted his OSC administrative remedy with respect to the two remaining alleged disclosures identified in his first IRA appeal – one concerning the alleged harassment of a fellow employee and another concerning his claim that he

witnessed an unreported physical assault – the administrative judge concluded that the appellant failed to meet his burden of establishing that those disclosures were protected.⁵ ID at 8-16. The administrative judge also determined that the Board lacked jurisdiction over the appellant's second IRA appeal concerning his alleged disclosure regarding an unaccredited residency program.⁶ ID at 34-35.

⁵ With respect to the alleged disclosure concerning the harassment of a fellow employee, the administrative judge found no indication in the record that the appellant told a second-level supervisor that he was assisting the fellow employee with any complaint. ID at 12-15. The administrative judge concluded that the appellant failed to show that he made a protected disclosure or that agency officials perceived him to be a whistleblower based on his relationship with a known whistleblower. ID at 15. With respect to the appellant's alleged disclosure based on his claim that he witnessed an unreported physical assault, the administrative judge found no support in the record for the appellant's claim that a physical assault occurred. He therefore concluded that the appellant did not engage in protected whistleblowing activity when he told a second-level supervisor of his immediate supervisor's alleged failure to intervene or discipline an employee for a physical assault that did not occur. ID at 16. The appellant does not challenge or address these findings and conclusions on review.

⁶ The administrative judge's disposition of the second IRA appeal should have been a denial of corrective action, rather than a finding of lack of jurisdiction. To establish jurisdiction over an IRA appeal, the appellant must prove he exhausted his administrative remedies with OSC and nonfrivolously allege that: (1) he engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Shibuya v. Department of Agriculture*, [119 M.S.P.R. 537](#), ¶ 25 (2013). In his appeal and in his testimony at the hearing, the appellant alleged that he disclosed that his immediate supervisor knowingly operated an unaccredited residency training program at the Northport VAMC, Nuclear Service, in which unqualified, non-physicians were permitted to evaluate and treat patients as though they were qualified doctors. HT at 34-36; IAF-II, Tab 1 at 4. The administrative judge determined that the appellant failed to meet his burden of proof with respect to this alleged disclosure, finding no credible evidence that the appellant reported the matter to a supervisor in June 2009, as he claimed. ID at 34-35. Such a finding goes beyond the nonfrivolous allegation stage of the proceedings to a determination of whether the appellant proved his prima facie case. See *Shibuya*, [119 M.S.P.R. 537](#), ¶ 25. The administrative judge further noted that the appellant's report of this matter to OSC post-dated his termination, and he concluded that the agency's failure to reinstate him was indistinguishable from the removal at issue in his first IRA appeal. ID at 35-36. The administrative judge thus concluded that the appellant failed to identify a personnel action separate from the matter under review in his first IRA appeal. ID at 35-36. The appellant does not challenge or address these findings and conclusions on review.

¶7 While the administrative judge thus concluded that the appellant failed to establish that he made any protected disclosures, he proceeded to determine in the alternative that, assuming the appellant had engaged in activity protected by the WPA, he met his burden of establishing that such activity was a contributing factor in his termination. ID at 36-37. Notwithstanding that determination, however, the administrative judge concluded that the agency established by clear and convincing evidence that it would have terminated the appellant absent any protected whistleblowing activity. ID at 37-52.

¶8 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has not filed a response to the appellant's petition for review.

ANALYSIS

The Board lacks jurisdiction to consider the merits of the agency's action terminating him from employment.

¶9 On review, the appellant challenges the agency's position that he failed to maintain an unrestricted license to practice medicine, and he contends, in the alternative, that such a requirement exceeds the agency's rulemaking authority. PFR File, Tab 1 at 6-9. As an agency Physician appointed under [38 U.S.C. § 7405](#)(a)(1)(A), which permits temporary appointments to positions such as physician positions listed in [38 U.S.C. § 7401](#), the appellant cannot appeal his termination directly to the Board. *See Yunus v. Department of Veterans Affairs*, [84 M.S.P.R. 78](#), ¶ 12 n.* (1999), *aff'd*, [242 F.3d 1367](#) (Fed. Cir. 2001). Thus, whether the appellant failed to maintain an unrestricted license to practice medicine, or whether such a requirement exceeds the agency's rulemaking authority, are not matters within the Board's authority to decide in this IRA appeal. *See id.*

¶10 Nonetheless, as the Board recognized in *Yunus*, in 1994 Congress extended the WPA's coverage to Department of Veterans Affairs Physicians. *Id.*; *see also*

[5 U.S.C. § 2105](#)(f); *Harding v. Department of Veterans Affairs*, [448 F.3d 1373](#), 1377 (Fed. Cir. 2006). Therefore, as the administrative judge correctly determined, the appellant can bring an IRA appeal in which the only issue before the Board is whether the termination was in reprisal for whistleblowing activity. ID at 7; *see Yunus*, [84 M.S.P.R. 78](#), ¶ 12 n.*.

The administrative judge correctly determined that the appellant failed to establish that he exhausted his administrative remedy with respect to several of his alleged disclosures.

¶11 In an IRA appeal, the appellant must first prove that the Board has jurisdiction over the appeal by proving, inter alia, that he exhausted his administrative remedies before OSC. *Shibuya v. Department of Agriculture*, [119 M.S.P.R. 537](#), ¶ 25 (2013). Once the appellant successfully proves jurisdiction, he must establish a prima facie case of whistleblower reprisal by proving by preponderant evidence that he made a protected disclosure that was a contributing factor in a personnel action against him.⁷ *Id.*

¶12 On review, the appellant contends that the administrative judge erred in determining that he had not exhausted his administrative remedy with OSC with

⁷ We note that the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465, which was enacted after the initial decision was issued in this case, amends [5 U.S.C. § 2302](#)(b)(8) to provide that it is a prohibited personnel practice to take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of:

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences:

(i) *any* violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety

(emphasis added). We have considered this amendment and find that it does not change the result in this case.

respect to six of his alleged disclosures. PFR File, Tab 1 at 9-10. We disagree. To satisfy the exhaustion requirement of [5 U.S.C. § 1214\(a\)\(3\)](#), an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action.⁸ *Ward v. Merit Systems Protection Board*, [981 F.2d 521](#), 526 (Fed. Cir. 1992); *Davis v. Department of Defense*, [103 M.S.P.R. 516](#), ¶ 10 (2006). The test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that he makes in the complaint requesting corrective action, not his post hoc characterization of those statements. *Ellison v. Merit Systems Protection Board*, [7 F.3d 1031](#), 1036 (Fed. Cir. 1993); *Davis*, [103 M.S.P.R. 516](#), ¶ 10.

¶13 The record supports the administrative judge's conclusion that the appellant failed to establish that proceedings before OSC were exhausted with respect to his alleged disclosures concerning: (1) abusive medical billing practices; (2) patient safety concerns for non-compliance with USP Standard No. 797; (3) employee safety concerns for non-compliance with NRC regulations and consequent radiation exposures; (4) destruction of federal records; (5) significantly compromised patient care quality from utilization of substandard imaging equipment; and (6) dictation system incompatibility with the hospital computer system allowing imaging reports to be filed by more than one provider on the same study. ID at 8-12. As the administrative judge noted, after acknowledging receipt of the appellant's complaint, OSC advised the appellant by

⁸ The Board will defer to OSC in its determination that it might need further information in order to pursue an investigation that might lead to corrective action. See, e.g., *Ballard v. Commissioner of Internal Revenue*, [544 U.S. 40](#), 70 (2005) (an agency's interpretation of its own rule or regulation is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation (quoting *Bowles v. Seminole Rock & Sand Co.*, [325 U.S. 410](#), 414 (1945))); see also *Cooper Technologies Co. v. Duda*, [536 F.3d 1330](#), 1337 (Fed. Cir. 2008) (because the Patent and Trademark Office is specifically charged with administering statutory provisions relating to "the conduct of proceedings in the Office," the court gave deference under *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, [467 U.S. 837](#) (1984))).

letter dated January 28, 2010, that the information he provided concerning his alleged disclosures was “quite brief,” and that additional information was required in order for it to determine whether he made protected disclosures. IAF-III, Tab 9 at 24. In his written response, the appellant stated, “[c]onsidering the statutory time constraints that you mentioned, I will not try to detail all of the disclosures, but will focus on the one I labeled, ‘Harassment of [a] fellow employee . . . by her supervisor.’” *Id.* at 41. By letter dated April 16, 2010, OSC notified the appellant of its preliminary determination that it could not determine that a violation of [5 U.S.C. § 2302](#)(b)(8) occurred, in part, because the appellant had provided insufficient information to demonstrate that he made a protected disclosure, and because, when asked to describe in detail the information that he disclosed, he declined to do so. *Id.* at 62-64.

¶14 OSC’s preliminary determination letter provided the appellant with another opportunity “to describe these disclosures, *in detail*.” *Id.* at 62 (emphasis in original). The administrative judge found, and we agree, that the appellant’s response to the OSC preliminary termination letter did not provide any further information regarding the above-referenced disclosures. *ID* at 11; *see* IAF-III, Tab 9 at 65-67. We also agree with the administrative judge’s determination that, because the information that the appellant provided to OSC was insufficient for it to pursue an investigation that might lead to corrective action concerning those alleged disclosures, the appellant failed to exhaust his administrative remedy with respect to them. *ID* at 11-12; *Ward*, 981 F.2d at 526.

¶15 Because the appellant failed to establish that proceedings before OSC were exhausted with respect to these disclosures, the Board lacks jurisdiction to consider them. *Ward*, 981 F.2d at 526 (the administrative judge justifiably refused to consider an issue that the appellant had not properly raised before OSC). The appellant’s contention that the parties stipulated below that he exhausted his administrative remedy with OSC is of no consequence. PFR File, Tab 1 at 10; *see Ney v. Department of Commerce*, [115 M.S.P.R. 204](#), ¶ 7 (2010)

(the issue of the Board's jurisdiction is always before the Board and may be raised sua sponte by the Board at any time); *King v. Department of Veterans Affairs*, [105 M.S.P.R. 21](#), ¶ 16 n.2 (2007) (although an agency can stipulate to facts, the question of jurisdiction is a legal conclusion not subject to stipulation).

The appellant's failure to exhaust his administrative remedy with OSC deprives the Board of jurisdiction to reach the question of whether these alleged disclosures were protected.

¶16 Although the administrative judge correctly determined that the Board lacks jurisdiction to consider the six alleged disclosures that the appellant failed to exhaust, he nonetheless proceeded to offer an alternative basis for rejecting the appellant's IRA claim with respect to each of them -- namely, that, even assuming for the sake of argument that the appellant had exhausted his OSC administrative remedy, the disclosures were not protected.⁹ ID at 16-34. On review, the appellant challenges the administrative judge's alternative determinations that he failed to make protected disclosures concerning patient safety concerns due to non-compliance with USP Standard No. 797, employee safety concerns due to non-compliance with NRC regulations, and abusive medical billing practices. PFR File, Tab 1 at 10-12; *see* ID at 16-30. As stated above, however, exhaustion with OSC is a jurisdictional prerequisite to Board consideration of the substance of these allegedly protected disclosures, *Ward*, 981 F.2d at 526, and the scope of an IRA appeal is limited to those disclosures raised before OSC, *Sazinski v. Department of Housing & Urban Development*, [73 M.S.P.R. 682](#), 685 (1997).

⁹ For example, the administrative judge determined, in the alternative, that the appellant failed to establish that he made a protected disclosure concerning abusive billing practices, in part, because he made these disclosures in the ordinary course of performing his duties, and in part because the administrative judge did not find the appellant's hearing testimony concerning these alleged disclosures to be credible. ID at 16-24.

The appellant's material submitted for the first time on review does not provide a basis for disturbing the initial decision.

¶17 On review, the appellant does not directly challenge the administrative judge's conclusion that he failed to prove that he made protected disclosures concerning the alleged harassment of a fellow employee and concerning his claim that he witnessed an unreported physical assault. However, he requests that the Board reexamine the administrative judge's determination that his immediate supervisor was credible in light of allegedly new and material evidence included with his petition for review. PFR File, Tab 1 at 18-24.

¶18 Under [5 C.F.R. § 1201.115](#), the Board may grant a petition for review based on a showing that new and material evidence is available. Evidence offered merely to impeach a witness's credibility, however, is not generally considered new and material. *Bucci v. Department of Education*, [42 M.S.P.R. 47](#), 55 (1989). In any event, even considering these additional documents, we conclude the appellant has not proffered a sufficiently sound reason to set aside the administrative judge's findings or conclusions. Although the administrative judge did consider the supervisor's hearing testimony, it was in the context of the administrative judge's alternative finding that the appellant failed to show that he made a protected disclosure concerning abusive billing practices. ID at 17-24. Because, as stated above, the appellant's failure to exhaust his administrative remedy with OSC deprives the Board of jurisdiction on this issue, the appellant's material submitted for the first time on review does not provide a basis for disturbing the initial decision.

The appellant's contentions concerning the administrative judge's alternative determination on the agency's affirmative defense do not provide a basis for granting review.

¶19 The appellant also contends on review that the administrative judge erred in concluding, in the alternative, that the agency established its affirmative

defense by clear and convincing evidence that it would have terminated the appellant in the absence of any protected activity. PFR, Tab 1 at 12-18, *see* ID at 37-52. Because none of the appellant's alleged disclosures were both exhausted and protected under the WPA, we do not address these contentions. *Kahn v. Department of Justice*, [618 F.3d 1306](#), 1316 (Fed. Cir. 2010) (declining to address whether the agency met its burden to prove its affirmative defense where the employee's communications were not protected under the WPA)¹⁰; *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

We deny the appellant's request for corrective action.

¶20 Finally, the appellant contends that the administrative judge erred in dismissing the appeals, apparently on jurisdictional grounds, after conducting a hearing on the merits of the appellant's claims. PFR File, Tab 1 at 5-6. We agree. As mentioned above, the administrative judge concluded that there was no evidentiary support for finding some of the appellant's alleged disclosures protected. ID at 15-16, 34-35. Such findings go beyond the stage of the proceedings during which jurisdiction is established, in part by finding that a

¹⁰ Although the Federal Circuit in *Kahn* declined the appellant's invitation to consider the agency's affirmative defense because it agreed with the Board that the appellant failed to establish his prima facie case, the court stated in dicta that, in an IRA appeal, even where the Board finds a contested merits issue dispositive, it should nevertheless resolve the remaining issues to expedite resolution of the case on appeal. *Id.* We note, however, that after *Kahn* was decided, Congress amended [5 U.S.C. § 1221\(e\)\(2\)](#) to provide that corrective action cannot be ordered if, "after a finding that a protected disclosure was a contributing factor," the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 114(b), 126 Stat. 1465, 1472 (emphasis added). Under this amendment, the Board may not proceed to the clear and convincing evidence test unless it has first made a finding that the appellant established his prima facie case. *See also* S. Rep. No. 112-743, at 24 (2012).

nonfrivolous allegation has been made that a disclosure is protected. *See Shibuya*, [119 M.S.P.R. 537](#), ¶ 25; *Azbill v. Department of Homeland Security*, [105 M.S.P.R. 363](#), ¶ 12 (2007) (the administrative judge erred in dismissing the appeal, apparently for lack of jurisdiction, after adjudicating it under the standards applicable to a determination on the merits).

¶21 Accordingly, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, and DENY the appellant's request for corrective action in each of these joined appeals. We VACATE the alternative findings and conclusions in the initial decision concerning the alleged disclosures from the appellant's first IRA appeal that he failed to raise with sufficient specificity in his request for corrective action with OSC.

ORDER

¶22 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under [5 U.S.C. § 2302\(b\)\(8\)](#), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge

the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* [5 U.S.C. § 7703](#)(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

SEPARATE OPINION OF ANNE M. WAGNER
CONCURRING IN PART AND DISSENTING IN PART

in

Colin Clarke v. Department of Veterans Affairs

MSPB Docket Nos. NY-1221-10-0226-W-2
NY-1221-11-0169-W-2

¶1 In the appellant’s first individual right of action (IRA) appeal, the appellant alleges that the Department of Veterans Affairs (VA) terminated his appointment as a physician in retaliation for making eight protected disclosures. MSPB Docket No. NY-1221-10-0226-W-2. The administrative judge found that the appellant failed to exhaust his administrative remedies with the Office of Special Counsel (OSC) as to six of the eight disclosures and that the remaining two disclosures were not protected. The majority affirms both findings and concludes that the appellant’s failure to exhaust his administrative remedy with regard to six of the eight disclosures deprives the Board of jurisdiction to reach the question of whether these disclosures were protected. As a threshold matter, I agree with the majority that if none of the appellant’s disclosures were both exhausted and protected under the Whistleblower Protection Act (WPA), then under the Whistleblower Protection Enhancement Act (WPEA), the Board may not proceed to determining whether the agency demonstrated by clear and convincing evidence that it would have taken the same personnel action absent the disclosures.* However, I disagree with the majority that the appellant failed to exhaust his OSC remedies as to six of the eight disclosures at issue here.

¶2 To meet the exhaustion requirement, an appellant “must inform the Special Counsel of the precise ground of his charge of whistleblowing” and “must ‘give

* I also concur with the majority’s modification of the dismissal of the appellant’s second IRA appeal, MSPB Docket No. NY-1221-11-0169-W-2, to a denial of corrective action on the merits. Majority Opinion, ¶¶ 6 n.6, 20-21.

OSC a sufficient basis to pursue an investigation which might have led to corrective action.’” *Briley v. National Archives and Records Administration*, [236 F.3d 1373](#), 1377 (Fed. Cir. 2001) (quoting *Ward v. Merit Systems Protection Board*, [981 F.2d 521](#), 526 (Fed. Cir. 1992) (citation omitted)). This means that an appellant must articulate with reasonable clarity and precision before OSC the basis for his complaint. *Id.* In determining whether this requirement has been met, the Board has found that it will consider the appellant’s OSC complaint and any subsequent correspondence with OSC. *Swanson v. General Services Administration*, [110 M.S.P.R. 278](#), ¶¶ 7-8 (2008). In addition, an appellant who has informed OSC of the basis for his retaliation claims may add further detail to those claims before the Board. *Briley*, 236 F.3d at 1378.

¶3 The appellant identified the following eight disclosures in his OSC complaint:

1. He reported on March 3, 2008, to Edward Carito, a VA Health Systems Specialist, “Abusive medical billing practices,” which he learned about the disclosure from “[p]ersonal observation. Billing guidelines from VA Central Office and compared to billing practices at VA.” IAF-III, Tab 9 at 8-9.
2. He reported on June 22, 2009, to Dr. Steve Kastin, an agency investigator, “Harassment of fellow employee Lillian Gucciardi by her supervisor,” and “Physical assault on Lillian Gucciardi by Grace Fahlbusch, secretary to Dr. Antar.” The appellant stated that he learned about the disclosure from “[p]ersonal observation and email communications.” *Id.* at 9.
3. He reported on June 22, 2009, to Dr. Steve Kastin, an agency investigator, “Physical assault on Lillian Gucciardi by Grace Fahlbusch, secretary to Dr. Antar.” The appellant stated that he learned about the disclosure from “[p]ersonal observation. Had to personally restrain Ms. Fahlbusch.” *Id.* at 10.
4. He reported to Douglas Murdock, Assistant Chief of Staff, on January 5, 2009, “Public safety concerns: non-compliance with USP-797.” *Id.* at 10-11.
5. He reported to Robert Grando, Radiation Safety Officer, on January 5, 2009, “Violation of Nuclear Regulatory Commission ALARA policy

Personally observed technologists exposed unnecessarily to ionizing radiation.” *Id.* at 14-15.

6. He reported to Kurt Lagermann, Privacy Officer, on August 10, 2009, “Destruction of Medical Records (films, reports).... Saw secretary destroying medical records. Regulations require 75 year retention.” *Id.* at 15-16.
7. He reported on August 12, 2008, to Dr. Edward Mack, Chief of Staff, “Substandard equipment used for patient care.... Directly observed obsolete equipment being used to image patients.” *Id.* at 16.
8. He reported to Dr. Christopher Miele, Chair, Imaging Informatics Council, on March 25, 2008, that “Dictation system incompatible with hospital computer system. Allows imaging report to be filed by more than one provider, on the same study (e.g. chest x-ray).... Dictated report of study being positive when it had already been interpreted and reported as negative.” *Id.* at 16-17.

¶4 In response to the appellant’s complaint, OSC requested in an email that the appellant provide more detailed information regarding the nature of his disclosures within 10 days. IAF-III, Tab 9 at 40. The appellant filed a timely reply stating that because of the time constraints imposed by OSC, “I will not try to detail all of the disclosures, but will focus on the one labeled “Harassment of fellow employee Lillian Gucciardi by her supervisor [disclosure 2]. It is an example of the misconduct, which resulted in the retaliatory termination of my Federal appointment. If, in order to make a positive determination under [5 U.S.C. 1213\(b\)](#), you need details of my other disclosures, please let me know.” *Id.* at 41. The appellant then provided a detailed narrative statement, which provided additional information regarding disclosures 2 and 4. OSC subsequently issued a preliminary determination letter stating that it could not determine whether a whistleblower violation had occurred because the appellant failed to provide sufficient information to demonstrate that he made a protected disclosure.

¶5 As noted above, the correct standard for exhaustion is whether the appellant articulated with reasonable clarity and precision the basis for his OSC complaint. The majority finds that the appellant satisfied this standard with

regard to disclosures 2 and 3, but not as to disclosures 1 and 4-8. Except for the vague allegation in disclosure 4, I believe that the appellant sufficiently articulated with reasonable clarity and precision the basis of his complaint with regard to disclosures 1, 5-8. Indeed, while a wholly vague, unspecified allegation may not satisfy the exhaustion requirement, the Board has consistently found allegations of similar specificity to the appellant's disclosures 1, 5-8 to be adequate to meet the administrative exhaustion requirement. *See Swanson*, [110 M.S.P.R. 278](#), ¶¶ 3, 8; *Horton v. Department of Veterans Affairs*, [106 M.S.P.R. 234](#), ¶¶ 8-14 (2007); *Heining v. General Services Administration*, [61 M.S.P.R. 539](#), 447 (1994).

¶6 Specifically, the initial complaint identified the individuals to whom the appellant reported the disclosures, stated the date of the disclosures and provided an adequate description of the information disclosed. I believe that this was sufficient information upon which to initiate an investigation. The fact that OSC requested additional information that the appellant declined to provide does not justify finding a failure to exhaust. Rather, it more accurately reflects the appellant's failure to meet his burden on the merits before OSC. Indeed, I interpret OSC's preliminary determination letter to be a merits determination, not a statement that it did not understand the nature of his alleged protected disclosures. As a result, I believe that the appellant exhausted his remedies before OSC with regard to his disclosures 1 and 5-8 and that the Board should adjudicate the merits of the appellant's IRA appeal as to those disclosures.

¶7 I also note my disagreement with the statement in the majority decision that the Board does not have the authority to determine whether the appellant failed to maintain an unrestricted license to practice medicine or whether that requirement exceeded the agency's rulemaking authority. Majority Decision, ¶ 9. While I agree that the appellant, as a VA physician, cannot appeal his removal directly to the Board under Title 5 U.S. Code, chapter 75, we are not thereby precluded from reviewing these issues in determining whether the agency has met

its clear and convincing burden in proving that it would have removed the appellant in the absence of his whistleblower protected conduct. *See Dick v. Department of Veterans Affairs*, [290 F.3d 1356](#), 1360-63 (Fed. Cir. 2002) *overruled on other grounds by Garcia v. Department of Homeland Security*, [437 F.3d 1322](#) (Fed. Cir. 2006) (*en banc*); *Cochran v. Department of Veterans Affairs*, [67 M.S.P.R. 167](#), 174 (1995) (Board has jurisdiction to review the removal of a VA physician in an IRA appeal).

¶8 Accordingly, I respectfully dissent in this case.

Anne M. Wagner
Vice Chairman